Office-Supreme Court, U.S.
FILED
APR 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1647

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

COUNCIL 13, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, by GERALD W. McENTEE, ITS TRUSTEE AD LITEM,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF JUSTICE, BUREAU OF CORRECTIONS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Pennsylvania Supreme Court properly affirmed the Contempt Order of the Commonwealth Court which imposed fines on the Local Union and those Corrections Officers who refused to comply with the Commonwealth Court's Order to return to work and cease their strike in violation of the Pennsylvania Public Employe Relations Act?

JURISDICTION

The Supreme Court does not have jurisdiction over this matter.

STATUTORY PROVISIONS INVOLVED

In addition to those provisions appearing in the Petitioner's Petition for a Writ of Certiorari the Respondent wishes to draw this Honorable Court's attention to Sections 2(2) and 2(3) of the National Labor Relations Act, 29 U.S.C. §§152, which provide:

> (2) The term 'employer' includes any person acting as an agent of an employer directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor

organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any spouse, or any individual having the status of an independent contractor, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not herein defined. (Emphasis added)

The Respondent also wishes to draw this Court's attention to the following provisions of the Pennsylvania Public Employe Relations Act. Section 1004 of the Pennsylvania Public Employe Relations Act, Act of July 23, 1970, P.L. 563, 43 P.S. §1101.1004, provides as follows:

> An unfair practice by a public employer shall not be a defense to a prohibited strike. Unfair practices by the employer during the collective bargaining processes shall receive priority by the board as set forth in Article XIV.

Section 1007 of the Pennsylvania Public Employe Relations Act, 43 P.S. §1101.1007, provides as follows:

> In the event any public employe refuses to obey an order issued by a court of competent jurisdiction for a violation of the provisions of this article, the punishment for such contempt may be by fine or by imprisonment in the prison of the county where the court is sitting or both in the discretion of the court.

Section 1008 of the Pennsylvania Public Employe Relations Act, 43 P.S. §1101.1008, provides as follows:

> Where an employe organization wilfully disobeys a lawful order of a court of competent jurisdiction issued for a violation of the provisions of this article, the punishment for each day that such contempt persists may be by a fine fixed in the discretion of the court.

STATEMENT OF THE CASE

On April 16, 1980, a strike action was initiated by Corrections Officers at the State Correctional Institution at Pittsburgh. All strikes by guards at correctional institutions are expressly forbidden by the Pennsylvania Public Employe Relations Act. 43 P.S. §1101.1001 (Supp. 1982-3). Guards at the Pittsburgh State Correctional Institution are called Corrections Officers.

Pursuant to Section 1001 of the Pennsylvania Public Employe Relations Act, the Employer, the Commonwealth of Pennsylvania, sought a preliminary injunction against the Local Union and the illegal strikers before the Commonwealth Court of Pennsylvania on April 16, 1980.

The Honorable Genevieve Blatt of the Commonwealth Court granted the motion for a preliminary injunction on April 16, 1980; however, the striking guards refused to return to their duties and, in fact, actively continued their strike in knowing disregard of Judge Blatt's order.

In response to the strikers' non-compliance with the Commonwealth Court's order, Judge Blatt continued the injunction following an April 18, 1980 hearing, and further informed the strikers at that time

that they would be held in contempt of court if they did not comply with the Commonwealth Court's order by the start of the 6 o'clock workshift on April 19, 1980. When the guards scheduled to report for the 6 o'clock shift failed to report for duty, Judge Blatt held that the striking union and guards were in civil contempt of the Commonwealth Court's order and imposed the fines in accordance with Sections 1005, 1007 and 1008 of the Act, 43 P.S. §§1101.1005, 1101.1007 and 1101.1008, in a decision and order that the Petitioner seeks to place before this Court for its review. The striking guards ultimately returned to work on April 22, 1980, and were reinstated as employes by the Commonwealth.

On June 12, 1980, Judge Blatt issued an order confirming and reducing the amounts of fines imposed on both the local Union and the

guards involved in the illegal strike. On June 30, 1980, the Union appealed the Commonwealth Court's order of June 12, 1980, to the Supreme Court of Pennsylvania. On August 19, 1982, the Union filed a Petition for Remittitur or Reduction of Fines in Commonwealth Court, which was denied by Judge Blatt on October 4, 1982. On December 15, 1982, the Pennsylvania Supreme Court entered its judgment and order affirming the June 12, 1980 Commonwealth Court order per curiam.

ARGUMENT

As can be seen by a review of Judge Blatt's June 12 order, which was affirmed without opinion by a per curiam order of the Supreme Court of Pennsylvania, the only issue addressed by the Commonwealth Court and the

Pennsylvania Supreme Court was the violation of the Commonwealth Court's contempt order by the Petitioners. It must be noted that the propriety of the preliminary injunction order itself was not challenged by the Petitioner in the courts below, rather only the June 12, 1980 order confirming and reducing fines imposed, pursuant to Sections 1007 and 1008 of the Pennsylvania Public Employe Relations Act, 43 P.S. §§1101.1007 and 1101.1008, on those parties found to be in contempt of the April 19, 1980 injunction order, has been challenged. This Court has refused to exercise jurisdiction in similar situations where no federal question has been decided in the state Supreme Court from which certiorari has been sought. See Herndon v. Georgia, 295 U.S. 441, 55 S.Ct. 794 (1935).

While Petitioner has repeatedly raised its argument with regard to the alleged

unfair practice as the basis for the strike, the order which the Petitioner has chosen to appeal deals exclusively with their contemptuous conduct. As Judge Blatt observed in her Opinion of October 4, 1982:

> We are unpersuaded that the reason for the strike is a factor for consideration here. The defendants were held in contempt not for striking in response to the then alleged unfair labor practice, but for refusing to honor this Court's order directing them to return to work. Furthermore, the defendants were given an opportunity to purge themselves of civil contempt, by the order of April 19, 1982, and were apprised of the specific fines which would result from their continued participation in the strike, yet they voluntarily chose to ignore the consequences and to continue in violating the order. We would also note that the fines, as levied, are only one-half of the fines which this Court originally set, this modification being made in light of the defendants' timely attempts to negotiate with the plaintiff.

Commonwealth v. Council 13, 867 C.D. 1980 (Commonwealth Court, filed October 4, 1982), at F.N. 3. Petition at 36a.

Thus the courts of the Commonwealth of Pennsylvania have dealt solely with Pennsylvania law and have not reached the question of the validity of any federal law or policy, let alone arrived at a decision holding such federal law invalid or superseded by state law. Accordingly, there is no question properly before this Honorable Court pursuant to 28 U.S.C. §1257(3). Hartford Life Insurance Co. v. Johnson, 249 U.S. 490, 39 S. Ct. 336 (1919).

The Petitioner would argue that the Commonwealth of Pennsylvania is bound by federal policy as developed under the National Labor Relations Act. However, that Act expressly excludes employes of the states

from its coverage. Section 2(3), 29 U.S.C. §152(3). The Pennsylvania Public Employe Relations Act provides the sole statutory vehicles for the Petitioner's claim. Under Pennsylvania law, strikes by prison guards are prohibited unconditionally. 43 P.S. §1101.1001. Thus, all references to the National Labor Relations Act by the Petitioner are inapposite in that the Commonwealth of Pennsylvania is not subject to that Act either by the terms of that Act or by voluntary Commonwealth action submitting itself to that Act's policies and standards. See Pennsylvania Labor Relations Board v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975).

Because the very language of the National Labor Relations Act excludes the states, as well as their employes, from its coverage,

any application of the policy expressed in Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 76 S.Ct. 349 (1956) could only be by analogy. But no analogy can apply for this policy of reinstating unfair labor practice strikers has no application to the instant facts. First, the Union has not alleged a failure by the Commonwealth to reinstate the striking guards. There is no evidence in the record even suggesting that the striking guards were not reinstated by the Commonwealth. Second, the policy announced in Mastro Plastics, supra, is based on rights of self-organization guaranteed under Section 7 of the National Labor Relations Act, 29 U.S.C. §157, and would not be applicable by analogy under Section 401 of the Pennsylvania Public Employe Relations Act, 43 P.S. §1101.401, which merely defines

self-organization as "lawful activity". In fact, the only employe right conferred under Section 401 is the right to refrain from organizational activity. The Mastro Plastics doctrine is based upon an express, statutorily-conferred right to organize and protects the exercise of that right. Under the Pennsylvania Public Employe Relations Act, there is no corresponding right. The language of that Act shows a conscious decision by the Pennsylvania General Assembly to permit organization by public employes, but not to confer any right to organize. Organizational activity by employes covered under the National Labor Relations Act is therefore offered greater protection than such activity by employes covered under the Pennsylvania Public Employe Relations Act. The Pennsylvania Public Employe Relations Act

precludes application of the Mastro Plastics doctrine to public employes subject to the Pennsylvania Public Employe Relations Act. 43 P.S. §1101.1004. Because this distinction bars the application of the Mastro Plastics doctrine to the Pennsylvania Public Employe Relations Act, there is no violation of federal policy and thus there is no basis to invoke jurisdiction under 28 U.S.C. §1257(3).

At no previous time did the Petitioner assert that the Mastro Plastics doctrine should be applied to the Pennsylvania Public Employe Relations Act to hold any of its provisions invalid or unconstitutional. Petitioner relies solely on a policy the National Labor Relations Board established under the National Labor Relations Act. The Petitioner has not even challenged the

failure to adopt the same policy by the Pennsylvania Court. Petitioner's sole argument is that the Courts of Pennsylvania have failed to consider as a mitigating factor in a civil contempt proceeding a federal statute that expressly does not apply to the Commonwealth. It is the Petitioner's burden to raise in a timely fashion those arguments that it would rely on before this Honorable Court and to preserve those arguments through the lower appelate courts. The Petitioner has failed to do this. Manifestly, this is not a question of important federal policy or federal law that requires this Honorable Court's review. It is an issue of pure state law too narrow in application and impact to warrant further judicial consideration.

CONCLUSION

For all the above-stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Commonwealth of Pennsylvania

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AFFIDAVIT OF SERVICE

I hereby certify that I am this day serving the enclosed Brief in Opposition upon the person and in the manner indicated below, in accordance with the United States Supreme Court Rule 28.5.

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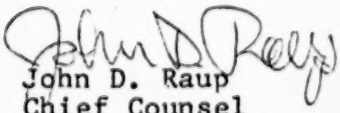
COMMONWEALTH OF PENNSYLVANIA



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April 15, 1983